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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DIRECT LIST LLC, a North Carolina  
11 Limited Liability Company; and  
ERAN SALU, an individual,

12 Plaintiff,

13 v.

14 VISTAGE INTERNATIONAL, INC.,  
a Delaware Corporation; PHIL  
15 KESSLER; LAUREN KESSLER;  
DIANA OWENS; EDETTE  
16 HERRON; and DOES 1 through 10,  
inclusive,

17 Defendant.

CASE NO. 15cv2025-WQH-JLB  
ORDER

18 HAYES, Judge:

19 The matter before the court is the Motion to Dismiss Pursuant to Fed. R. Civ.  
20 Proc. 12(B)(6) filed by Defendant Vistage International, Inc.<sup>1</sup> (ECF No. 11).

21 **I. Background**

22 On September 11, 2015, Plaintiffs Direct List LLC and Eran Salu (“Plaintiffs”)  
23 commenced this action by filing the Complaint alleging four causes of action: (1) fraud,  
24 (2) breach of fiduciary duty, (3) misappropriation of trade secrets in violation of  
25 California Civil Code § 3426 *et seq.*, and (4) unfair business practices in violation of  
26 California Business and Professions Code § 17200 *et seq.* (ECF No. 1). On October

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28 <sup>1</sup> In the Motion to Dismiss, Defendant states that its name is VISTAGE  
WORLDWIDE, INC and that it was “erroneously sued as VISTAGE  
INTERNATIONAL, INC.” (ECF No. 11-1 at 1).

27, 2015, Defendant Vistage International (“Vistage”) filed a motion to dismiss Plaintiffs’ first and second causes of action—fraud and breach of fiduciary duty—pursuant to Federal Rule of Civil Procedure 12(b)(6) with prejudice for failure to state a claim upon which relief can be granted. (ECF No. 11). On November 16, 2015, Plaintiffs filed a response in opposition. (ECF No. 12). On November 23, 2015, Vistage filed a reply. (ECF No. 14).

## **II. Allegations of the Complaint**

Vistage is an organization that offers chief executive officers (CEOs) a “confidential, trusted forum in which CEOs may safely discuss their most sensitive and private business affairs with fellow CEOs, led and overseen by the CEO Group Chair.” (ECF No. 1 at ¶2). “Vistage International, Inc. provides all prospective and actual members with repeated assurances that the information that members share in the Vistage setting will be treated with the utmost care and confidentiality.” *Id.* at ¶ 3. “According to the Vistage website, the very first ‘Vistage Core Value’ is Trust, which requires that Vistage Chairs ‘honor confidentially.’” *Id.* at ¶ 4. The website further explains that the groups, which meet once a month, are “confidential forums.” *Id.* at ¶ 5.

Vistage provides its services through Vistage Chairs, who are “highly experience, well-vetted (by Vistage), ‘expert executive coaches’ . . . .” *Id.* at ¶ 24. “Vistage’s website states that its peer advisory, business mentoring, and corporate coaching programs are ‘all led by Vistage Chairs,’ and touts that ‘our coaching Chairs have been at the heart of what makes the Vistage experience so powerful for so many members.’” *Id.* at ¶ 25. “Vistage’s website explains the in-depth application process involved with becoming a Chair, as well as the ‘rigorous on-boarding program’ and ‘rigorous development program’ required of each business coach ‘before they join the Vistage community.’” *Id.* at ¶ 26. “The website also states that ‘Vistage will provide [its Chairs] with a suite of proven tools, techniques and resources to get your peer advisory group off the ground and keep it aloft.’” *Id.* Vistage “represents that ‘[t]he role of a

1 Vistage Chair is to ensure that every bit of their group’s experience and wisdom is  
2 applied in a training meeting . . . [Chairs] are totally committed to the success of group  
3 members . . . [and] take on the role with the express purpose of helping others build  
4 great businesses.” *Id.* at ¶ 28. Vistage’s Terms of Use state, “All members of the  
5 Vistage community (including Vistage members, chairs, speakers, Vistage employees  
6 and certain partners or service providers) who access any Member Site agree to abide  
7 by the duties and obligations set out in Vistage’s Confidentiality Pledge and Standards.”  
8 *Id.* at ¶ 29.

9 “Plaintiff Direct List LLC (“Direct List”) is a direct marketing company with  
10 over 30 years of experience in lead generation, email marketing, direct mail, and data  
11 processing within the B2B Marketing, B2C Marketing, Real Estate Marketing, and  
12 High School Reunions industries.” *Id.* at ¶ 23. Plaintiff Eran Salu (“Salu”) created  
13 Direct List LLC. *Id.* at ¶ 7.

14 In or around 2007, Salu joined Vistage and paid “\$1,300 monthly for his Vistage  
15 membership.” *Id.* at ¶ 30. “At the time Mr. Salu joined Vistage, he was given written  
16 and verbal assurances by Vistage that the peer advisory group meetings would be  
17 strictly confidential, meaning that neither the Chair of the group, nor any of its  
18 members, would be at liberty to disclose any discussions that took place during group  
19 meetings with any third parties.” *Id.* at ¶ 31. “Indeed, during the group meetings, the  
20 Chair and the members routinely acknowledged that they were ‘sworn to  
21 confidentiality’ concerning what occurred during the meeting.” *Id.* at ¶ 32. “These  
22 representations of confidentiality and privacy directly aligned with the assurances on  
23 Vistage’s website and in Vistage member materials.” *Id.*

24 In 2011, Salu moved to San Diego, California, and “joined a [Vistage] group  
25 chaired by Defendant Phil Kessler . . . .” *Id.* at ¶ 34. “At all times relevant herein, Mr.  
26 Kessler was acting as the agent of Vistage International, and his actions were authorized  
27 by Vistage International, and later ratified by Vistage International.” *Id.* at ¶ 35.

28 “For the following . . . three years, during various Vistage Group meetings, Mr.

1 Salu shared highly confidential and sensitive business information and trade secrets  
2 about Direct List with Mr. Kessler. This information included, but was not limited to,  
3 the inner workings of the Direct List operation; potential and actual customers of Direct  
4 List, and details about various methodologies being used to provide services to clients  
5 ....” *Id.* at ¶ 36. “Throughout Mr. Salu’s involvement with the Vistage Group, he was  
6 promised that everything he shared with his Vistage Chair would be maintained as  
7 strictly confidential.” *Id.* at ¶ 37.

8 In or around 2012, Salu “began providing direct marketing services to Mr.  
9 Kessler, in his role as Vistage Chair.” *Id.* at ¶ 40. “These services included drafting  
10 direct marketing correspondence and emailing this correspondence to many potential  
11 Vistage customers, encouraging them to join Vistage.” *Id.* “The customized emails  
12 drafted by Direct List for Vistage included, at Vistage’s request, a representation that  
13 all Vistage group sessions are strictly ‘confidential.’” *Id.* at ¶ 45. “Mr. Salu understood  
14 that Mr. Kessler and Vistage International stood to benefit financially if the leads  
15 provided by Mr. Salu resulted in actual new Vistage members, since Vistage  
16 membership dues are split between them.” *Id.* at ¶ 39.

17 “Within a few months of using Direct List’s services, Mr. Kessler was able to  
18 enroll a number of new Vistage members, thereby benefitting both Mr. Kessler and  
19 Vistage International.” *Id.* at ¶ 41. “Mr. Kessler informed other Vistage Chairs about  
20 his success in using Direct List’s services, and within 6 months, over 30 Vistage Chairs  
21 had hired Direct List for lead generation and direct marketing services.” *Id.* at ¶ 42.  
22 “Soon thereafter, in approximately late 2012, Vistage corporate asked to meet with Mr.  
23 Salu, and the parties discussed Direct List’s provision of services to Vistage.” *Id.* at ¶  
24 43. “Following this meeting, Direct List began to provide direct marketing to Vistage  
25 and its Group Chairs.” *Id.* “The work for Vistage was performed by Direct List’s  
26 Direct Marketing Group team, which at all times relevant to the Complaint was  
27 comprised of the following five individuals: Edette Herron, Corine Redira, Risit  
28 Ratanadiloknaphuket, Cecile Agabao, and Oscar Vasquez.” *Id.* at ¶ 46.

1 “One day in or late 2013, following a Vistage Group meeting, Mr. Kessler  
2 approached Mr. Salu and asked to be paid 10% of Direct List’s profits from the business  
3 it was conducting with Vistage. Mr. Kessler justified this request by suggesting that he  
4 had been responsible for introducing Direct List’s services to other Vistage Chairs.”  
5 *Id.* at ¶ 49. “In response, Mr. Salu reminded Mr. Kessler of the stated purpose of  
6 Vistage and its Chairs – namely, to help members build their businesses through  
7 providing feedback, guidance, and other support – and replied that Mr. Kessler was not  
8 entitled to a share of Direct List’s profits simply for performing his job as a Vistage  
9 Chair.” *Id.* at ¶ 50. “Mr. Kessler conceded that he could not expect compensation from  
10 Direct List for action that he took in his role as a Vistage Chair.” *Id.* at ¶ 51.

11 In or around 2014, “Salu told Mr. Kessler that Ms. Herron could benefit from  
12 becoming a Vistage member.” *Id.* at ¶ 48. “Mr. Kessler subsequently placed Ms.  
13 Herron in a different Vistage group, and Mr. Salu paid for her membership.” *Id.* “Mr.  
14 Kessler was also aware that Ms. Herron was the main point-person for the services  
15 being performed for Vistage . . . .” *Id.* at ¶ 48.

16 “In or around February 2015, Mr. Salu informed Mr. Kessler that he would be  
17 moving to Florida in 3 months, and that he could therefore no longer participate in Mr.  
18 Kessler’s Vistage Group.” *Id.* at ¶ 52. In May 2015, shortly after Salu moved to  
19 Florida, “Ms. Herron informed Mr. Salu that she needed to take disability leave for 30  
20 days.” *Id.* at ¶ 54. Approximately two weeks later, all of Salu’s employees quit. *Id.*  
21 at ¶¶ 55, 56. Salu then discovered a “competitor company called AVS Leads.” *Id.* at  
22 ¶ 58. Salu learned that Herron worked at AVS Leads and that Kessler’s daughter was  
23 the general manager. *Id.* at ¶¶ 58, 59. Kessler “conceded that he had introduced his  
24 daughter and Ms. Herron to facilitate the formation of a business intended to directly  
25 compete with Direct List.” *Id.* at ¶ 61.

26 “On June 17, 2015, Mr. Kessler confirmed to other members of his CEO Group  
27 that senior management and legal ‘council’ (sic) of Vistage International was ‘fine’ with  
28 his actions.” *Id.* at ¶ 10. “On June 25, 2015, Mr. Kessler sent an email to his Vistage

1 Group . . . in which he represented that ‘his daughter’ had been ‘want[ing] to expand  
2 into lead generation.’” *Id.* at ¶ 65. “Mr. Kessler’s email conceded that he had made a  
3 ‘major mistake’ and recognized that he had breached the confidentiality obligations of  
4 a Vistage Chair.” *Id.*

5 “Mr. Kessler conspired with his daughters, with Ms. Herron, and with other Doe  
6 Defendants to set up a business, AVS Leads, that would directly and unfairly compete  
7 with Direct List by making use of Direct List’s confidential and proprietary information  
8 and Trade Secrets, as well as by poaching all of Direct List’s Direct Marketing Group  
9 employees.” *Id.* at ¶ 69.

10 “The formation and success of AVS Leads was made possible solely through the  
11 misappropriation of Direct List’s confidential business materials, which was  
12 orchestrated by Mr. Kessler in reliance on confidential information he had learned from  
13 Mr. Salu in his role as Vistage Chair, acting as agent for Vistage International.” *Id.* at  
14 ¶ 75. “When Mr. Salu became aware of this theft of his confidential information, he  
15 promptly contacted Vistage International, Inc., only to be told that it was not their  
16 problem or concern.” *Id.* at ¶ 9. “When Mr. Salu attempted to contact Vistage  
17 International, Inc.’s senior corporate management and counsel, they initially refused to  
18 respond, and then eventually ratified Mr. Kessler’s actions.” *Id.*

19 Plaintiffs allege the following causes of action: (1) fraud against Vistage and  
20 Kessler; (2) breach of fiduciary duty against Vistage and Kessler; (3) misappropriation  
21 of trade secrets in violation of California Civil Code section 3426 *et seq.* against  
22 Kessler, Ms. Kessler, Owens, and Herron; and (4) unfair competition in violation of  
23 Business and Professions Code section 17200 *et seq.* against all Defendants.

### 24 **III. Discussion**

#### 25 **A. Standard of Review**

26 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
27 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that  
28 states a claim for relief must contain . . . a short and plain statement of the claim

1 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Dismissal under  
 2 Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or  
 3 sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*  
 4 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

5 To sufficiently state a claim for relief and survive a Rule 12(b)(6) motion, a  
 6 complaint “does not need detailed factual allegations” but the “[f]actual allegations  
 7 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*  
 8 *Twombly*, 550 U.S. 544, 555 (2007). “[A] plaintiff’s obligation to provide the grounds  
 9 of his entitlement to relief requires more than labels and conclusions, and a formulaic  
 10 recitation of the elements of a cause of action will not do.” *Id.* When considering a  
 11 motion to dismiss, a court must accept as true all “well-pleaded factual allegations.”  
 12 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). However, a court is not “required to accept  
 13 as true allegations that are merely conclusory, unwarranted deductions of fact, or  
 14 unreasonable inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
 15 Cir. 2001). “In sum, for a complaint to survive a motion to dismiss, the non-conclusory  
 16 factual content, and reasonable inferences from that content, must be plausibly  
 17 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572  
 18 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

### 19 **B. Fraud Claim**

20 Vistage contends that Plaintiffs’ fraud claim should be dismissed because it is not  
 21 plead with the requisite specificity required by Federal Rule of Civil Procedure 9(b).  
 22 Vistage contends that Plaintiff failed to adequately plead “two critical components for  
 23 a fraud claim: knowledge of falsity (scienter) and Vistage’s intent to defraud him with  
 24 these representations.” (ECF No. 14 at 2). Vistage contends that Plaintiffs’ “agency  
 25 allegations fail for lack of specificity, as Plaintiffs plead no allegations, other than  
 26 overboard conclusory allegations, sufficient to show that Vistage directed or  
 27 participated in the wrongful conduct.” (ECF No. 11-1 at 5). Defendant also contends  
 28 that Plaintiff’s agency allegations fail because Kessler was an “independent contractor.”



1 *Id.* at 1, 2, 7.

2 Plaintiffs contend that the fraud claim against Vistage is pled with the requisite  
3 specificity because the Complaint is “very specific regarding the fraudulent  
4 misrepresentations made by Vistage” and the Complaint “alleges that Vistage is liable  
5 for the actions attributable to Phil Kessler under the legal doctrines of agency and  
6 ratification.” *Id.* at 4, 10.

7 Under California law, the elements of a claim for fraud are: “(1) a  
8 misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of  
9 the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the  
10 misrepresentation; (4) justifiable reliance; and (5) resulting damages.” *Cadlo v. Owens-*  
11 *Illinois, Inc.*, 125 Cal. App. 4th 513, 519 (2004) (citing *Small v. Fritz Cos., Inc.*, 30 Cal.  
12 4th 167, 173 (2003)). Claims sounding in fraud or mistake must comply with the  
13 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which  
14 requires that a complaint “must state with particularity the circumstances constituting  
15 fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) “requires . . . an account of the time,  
16 place, and specific content of the false representations as well as the identities of the  
17 parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir.  
18 2007) (quotation omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,  
19 1106 (9th Cir. 2003) (averments of fraud must be accompanied by “the who, what,  
20 when, where, and how of the misconduct charged”) (quotation omitted).

21 In a suit involving multiple defendants, “there is no absolute requirement that  
22 . . . the complaint must identify *false statements* made by each and every defendant.”  
23 *Swartz*, 476 F.3d at 764 (emphasis in original). “On the other hand, Rule 9(b) does not  
24 allow a complaint to merely lump multiple defendants together but requires plaintiffs  
25 to differentiate their allegations when suing more than one defendant and inform each  
26 defendant separately of the allegations surrounding his alleged participation in the  
27 fraud.” *Id.* at 764-65 (citation, internal quotations, and alterations omitted). “[A]  
28 plaintiff must, at a minimum, identify the role of each defendant in the alleged



1 fraudulent scheme.” *Id.* at 765 (citation, internal quotations, and alterations omitted).

2 “It is well established that traditional vicarious liability rules ordinarily make  
3 principals or employers vicariously liable for acts of their agents or employees in the  
4 scope of their authority or employment.” *Meyer v. Holley*, 537 U.S. 280, 285 (2003).  
5 For example, “a principal is liable for an agent’s fraud though the agent acts solely to  
6 benefit himself, if the agent acts with apparent authority.” *Am. Soc. of Mech.*  
7 *Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982). “Under an apparent  
8 authority theory, liability is based upon the fact that the agent's position facilitates the  
9 consummation of the fraud, in that from the point of view of the third person the  
10 transaction seems regular on its face and the agent appears to be acting in the ordinary  
11 course of the business confided to him.” *Id.* (internal quotation marks omitted).

12 Under California law, ratification may create an agency relationship where one  
13 did not exist. Cal. Civ. Code § 2307 (“An agency may be created, and an authority  
14 may be conferred, by a precedent authorization or a subsequent ratification.”). A  
15 principal may become liable for an act not originally authorized, if the principal ratifies  
16 that act. *Shultz Steel Co. v. Hartford Accident & Indem. Co.*, 231 Cal. Rptr. 715, 720  
17 (Ct. App. 1986).

18 Plaintiffs allege that Vistage had an “in-depth application process involved with  
19 becoming a Chair” as well as a “rigorous on-boarding program” and a “rigorous  
20 development program” for its Chairs. *See* ECF No. 1 at ¶ 26. Plaintiffs allege that  
21 Vistage advertised that it provided its Chairs with “tools, techniques and resources to  
22 get your peer advisory group off the ground and keep it aloft.” *See id.* Plaintiffs allege  
23 that at all relevant times, “Kessler was acting as the agent of Vistage International, and  
24 his actions were authorized by Vistage International, and later ratified by Vistage  
25 International.” *Id.* at ¶ 35. Plaintiffs allege that Kessler confirmed to other members  
26 of the CEO Group that Vistage senior management and legal counsel were “fine” with  
27 Kessler’s actions. *See id.* at ¶ 10. The allegations of the Complaint are adequate to  
28 infer that Vistage may be liable for the actions of Kessler under the theory of agency

1 and ratification. Vistage’s claim that Kessler was an “independent contractor,” *see e.g.*,  
 2 ECF No. 12 at 2, is a factual matter not resolved at the pleading stage.

3 Plaintiffs’ Complaint includes several allegations detailing the time, place, and  
 4 content of representations made by Vistage and Kessler to Plaintiffs. Plaintiffs allege  
 5 that Vistage advertised on its website that confidentiality was a “Core Value” and that  
 6 Vistage Chairs “honor confidentiality.” (ECF No. 1 at ¶¶ 4, 27). Plaintiffs also allege  
 7 that at the time Salu joined Vistage “he was given written and verbal assurances by  
 8 Vistage that the peer advisory group meeting would be strictly confidential . . . .” *Id.*  
 9 at ¶ 31. Plaintiffs allege that they justifiably relied on those promises of confidentiality  
 10 when joining Vistage and sharing confidential information at the meetings. *Id.* at ¶ 33.  
 11 Plaintiffs allege, generally, that Kessler knew that the representations of confidentiality  
 12 were false and that Kessler intended to induce Plaintiffs reliance with the intent to  
 13 defraud and deceive Plaintiffs. *See Odom v. Microsoft Corp.*, 486 F.3d 541, 553-54  
 14 (9th Cir. 2007) (“While the factual circumstances of the fraud must be alleged with  
 15 particularity, the state of mind—or scienter—of the defendants may be alleged  
 16 generally.”). Plaintiffs allege that Ms. Herron joined Vistage and that Kessler placed  
 17 her “in a different Vistage group” than the one that Saru was in. *Id.* at ¶ 48. Plaintiffs  
 18 allege that Kessler “conceded that he had introduced his daughter and Ms. Herron to  
 19 facilitate the formation of a business intended to directly compete with Direct List.” *Id.*  
 20 at ¶ 61. Plaintiffs allege that Mr. Kessler sent an email in which he “conceded that he  
 21 had made a ‘major mistake’ and recognized that he had breached the confidentiality  
 22 obligations of Vistage Chair.” *Id.* at ¶ 65. Plaintiffs allege that “Kessler conspired  
 23 with his daughters . . . [and] Ms. Herron . . . to set up a business, AVS Leads, that would  
 24 directly and unfairly compete with Direct List by making use of Direct List’s  
 25 confidential and proprietary information and trade Secrets . . . .” *Id.* at ¶ 69. The Court  
 26 concludes that the allegations of the Complaint are sufficient to show that Kessler may  
 27 be liable for fraud and that Vistage may be liable for Kessler’s actions.

### 28 **C. Fiduciary Duty Claim**

1 Vistage contends that it does not owe Salu a fiduciary duty. (ECF No. 11-1 at  
 2 6). Vistage contends that, “[a]t best, Salu claims that Vistage breached a promise to  
 3 Salu to provide confidentiality.” *Id.* Vistage contends that,

4  
 5 Vistage had no personal relationship with Salu that created a relationship  
 6 of trust and confidence that placed Vistage in a superior relationship.  
 7 And, Vistage did not create a fiduciary duty between it and Salu just  
 because it contracted with Salu to add him to Round Table Meetings  
 chaired by Phil [Kessler], an independent contractor.

8 *Id.* at 6-7.

9 Plaintiffs contend that the Complaint alleges a fiduciary duty because it alleges  
 10 that “Vistage held out itself and its Chairs as providing confidential business services  
 11 and voluntarily accepted the trust and confidence of Salu.” (ECF No. 12 at 15).  
 12 Plaintiffs contend that the Complaint alleges that Kessler breached the fiduciary duty and  
 13 that Vistage is liable for Kessler’s actions under the legal doctrines of agency and  
 14 ratification.

15 Under California law, the elements for breach of fiduciary duty are: (1) the  
 16 existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting  
 17 damage. *Pellegrini v. Weiss*, 81 Cal. Rptr. 3d 387, 397 (Ct. App. 2008). There are two  
 18 kinds of fiduciary duties—those imposed by law and those undertaken by agreement.  
 19 *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103 (Ct. App. 1998). Legal relationships  
 20 such as “guardian and ward, trustee and beneficiary, principal and agent, or attorney and  
 21 client” are examples of fiduciary relationships imposed by law. *Barbara A. v. John G.*,  
 22 193 Cal. Rptr. 422, 431 (Ct. App. 1983).

23 “A fiduciary duty is undertaken by agreement when one person enters into a  
 24 confidential relationship with another.” *GAB Bus. Servs., Inc. v. Lindsey & Newsom*  
 25 *Claim Servs., Inc.*, 99 Cal. Rptr. 2d 665, 670 (Ct. App. 2000). “[A] confidential  
 26 relationship arises ‘where a confidence is reposed by one person in the integrity of  
 27 another, and . . . the party in whom the confidence is reposed, . . . voluntarily accepts  
 28 or assumes to accept the confidence.’” *Id.* (citing *Barbara A.* 193 Cal. Rptr. at 432).

1 However, the mere fact that parties “reposed trust and confidence in each other” does  
 2 not establish a fiduciary relationship. *Girard v. Delta Towers Joint Venture*, 26 Cal.  
 3 Rptr. 2d 102, 106 (Ct. App. 1993). “A fiduciary . . . assumes duties beyond those of  
 4 mere fairness and honesty . . . he must undertake to act on behalf of the beneficiary,  
 5 giving priority to the best interest of the beneficiary.” *Comm. On Children's Television,*  
 6 *Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 676 (1983). “The essence of a fiduciary or  
 7 confidential relationship is that the parties do not deal on equal terms, because the  
 8 person in whom trust and confidence is reposed and who accepts that trust and  
 9 confidence is in a superior position to exert unique influence over the dependent party.”  
 10 *Barbara A.*, 193 Cal. Rptr. at 432. “[B]efore a person can be charged with a fiduciary  
 11 obligation, he must either knowingly undertake to act on behalf and for the benefit of  
 12 another, or must enter into a relationship which imposes that undertaking as a matter  
 13 of law.” *Children's Television*, 673 P.2d at 675-76. “Not surprisingly, the existence of  
 14 such a relationship founded upon agreement (the ‘repose’ and ‘acceptance’ of a  
 15 confidence) is a question of fact.” *GAB Bus. Servs.*, 99 Cal. Rptr. 2d at 670.

16 In this case, Vistage and Plaintiffs do not have a legal relationship that creates a  
 17 fiduciary duty imposed by law; therefore, the only fiduciary duty that could have been  
 18 created between Vistage and Plaintiffs would be one undertaken by agreement. *See*  
 19 *Maglica*, 78 Cal. Rptr. 2d at 103 (describing the two types of fiduciary duties).  
 20 Plaintiffs allege that Vistage advertised itself and its Chairs as providing confidential  
 21 services and that Salu relied on those repeated assurances of confidentiality when  
 22 joining Vistage. *See* ECF No. 1 at ¶¶ 4, 5, 7, 29, 31, 32, 33. Plaintiffs allege that “[a]t  
 23 the time Mr. Salu joined Vistage, he was given written and verbal assurances by Vistage  
 24 that the peer advisory group meetings would be strictly confidential . . . .” *Id.* at ¶ 30.  
 25 Plaintiffs generally allege that Vistage gave Salu “written and verbal assurances” of  
 26 confidentiality. *See e.g., City Sols., Inc. v. Clear Channel Commc'ns, Inc.*, 201 F. Supp.  
 27 2d 1048, 1049 (N.D. Cal. 2002) (Noting that “parties to a confidentiality agreement do  
 28 not stand in a fiduciary relationship as to each other simply by virtue of the

1 agreement.”). The Court concludes that Plaintiff has not alleged sufficient facts  
2 plausibly suggestive of a fiduciary relationship between Vistage and Plaintiff. *See*  
3 *Barbara A.*, 193 Cal. Rptr. at 432 (“The essence of a fiduciary or confidential  
4 relationship is that the parties do not deal on equal terms because [one party] . . . is in  
5 a superior position to exert unique influence over the dependent party.”); *Children's*  
6 *Television*, 673 P.2d at 675-76 (“To be charged with a fiduciary duty a party must  
7 “knowingly undertake to act on behalf and for the benefit of another[.]”). Defendant’s  
8 motion to dismiss Plaintiffs’ claim of breach of fiduciary duty is granted.

9 **IV. Conclusion**

10 IT IS HEREBY ORDERED that Defendant’s motion to dismiss is granted (ECF  
11 No. 11) in part and denied in part. Plaintiffs’ claim for breach of fiduciary duty is  
12 dismissed without prejudice. Plaintiffs’ claim for fraud is not dismissed.

13 DATED: February 8, 2016

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15 **WILLIAM Q. HAYES**  
16 United States District Judge  
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